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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 TOMMIE SLACK )

09 Plaintiff, )

10 v. )

11 JIM HAGGERTON, et al., )

12 Defendants. )  
13 \_\_\_\_\_ )

CASE NO. C12-0541-RAJ-MAT

REPORT AND RECOMMENDATION

14 Plaintiff, proceeding *pro se* and *in forma pauperis* (IFP), submitted to the Court for  
15 filing a 42 U.S.C. § 1983 civil rights complaint. (Dkt. 7.) After directed to show cause why  
16 this matter should not be dismissed, plaintiff submitted a motion for voluntary dismissal,  
17 followed by a motion to strike the motion for dismissal and for an enlargement of time to  
18 respond to the Court's Order to Show Cause. (Dkts. 8-10.) The Court struck the motion for  
19 voluntary dismissal and granted plaintiff additional time to respond. (Dkt. 11.) The Court  
20 also reminded plaintiff of deficiencies in his proposed complaint, including, *inter alia*, that it  
21 appeared to be barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (where a § 1983  
22 action implies the invalidity of a criminal conviction or sentence, the action may not proceed

01 unless plaintiff first succeeds in overturning the underlying conviction or sentence through  
02 direct appeal or a post-conviction type of proceeding).

03       Plaintiff now again seeks to voluntarily dismiss this case without prejudice pursuant to  
04 Federal Rule of Civil Procedure 41(a)(1). (Dkt. 12.) Because the opposing parties have not  
05 yet been served, this matter is appropriate for dismissal without a court order. Fed. R. Civ. P.  
06 41(a)(1)(A)(i). However, at the same time as he requests dismissal, plaintiff seeks a stay of the  
07 proceedings pursuant to Rule 62(b). (Dkt. 12.) He indicates his intention to file a personal  
08 restraint petition in state court and requests that the Court stay these proceedings pending the  
09 outcome of state proceedings so that he will not be forced to incur additional filing fees in again  
10 seeking relief in this court. *See* 28 U.S.C. § 1915(b)(1) (requiring payment of filing fee in  
11 partial payments for prisoners proceeding IFP).

12       Plaintiff's request for a stay of this matter should be denied. Rule 62(b), allowing for a  
13 stay of proceedings to enforce a judgment pending the disposition of a motion, is inapplicable.  
14 Further, a stay is not necessary or appropriate in this § 1983 case. For the reasons described in  
15 the Court's Order to Show Cause, plaintiff's proposed complaint is subject to dismissal. (*See*  
16 Dkt. 8.) In any event, plaintiff, in noting his intention "to challenge the fact or duration of his  
17 confinement without having to refile a third time" (Dkt. 12 at 3), makes plain his intention to  
18 pursue a 28 U.S.C. § 2254 habeas corpus petition in this Court should he not find relief in state  
19 court. Plaintiff should, accordingly, initiate a habeas proceeding in this Court if he does not  
20 succeed at the state level, rather than pursue a civil rights action. Plaintiff is further advised  
21 that the provisions of 28 U.S.C. § 1915 requiring prisoners bringing civil actions to pay the full  
22 filing fees, even if they are permitted to proceed IFP, do not apply to habeas proceedings.

01 *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997). As such, in pursuing a habeas matter in this  
02 Court, plaintiff would pay no fee if he qualified for IFP status or would be required to pay only  
03 the \$5.00 filing fee for a habeas action.

04 Given the above, the Court recommends that plaintiff's request for a stay be DENIED,  
05 that his request for voluntary dismissal be GRANTED, and that this matter be dismissed  
06 without prejudice. A proposed order accompanies this Report and Recommendation.

07 DATED this 12th day of June, 2012.

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10 Mary Alice Theiler  
11 United States Magistrate Judge  
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